No. 83-268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHELIN TIRE CORPORATION,
COMMERCIAL DIVISION,
Petitioner,

v.

BOSTICK OIL COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does evidence of dealer complaints about a "price-cutter" to a manufacturer, followed by directives to the manufacturer's corporate officials to take action against the price-cutter and resulting in the price-cutter's termination, support an inference of conspiracy violative of Sherman § 1 sufficient to withstand a motion for a directed verdict?

2. Where a manufacturer's marketing program is used as a manner of controlling the resale prices of its dealers, should a *per se* standard of illegality be applied to such program?

3. Should this Court grant certiorari to review federal antitrust claims, where a court of appeals has remanded the case for a new trial under the plaintiff's South Carolina Unfair Trade Practices Act claim and the propriety of that ruling has not been challenged in these proceedings?

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Bostick Oil Company, Inc., by its undersigned counsel, respectfully requests that this Honorable Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

Bostick Oil Company, Inc. (Bostick) instituted this action against Michelin Tire Corporation, Commercial Division (Michelin) alleging violations of 15 U.S.C. § 1 and the South Carolina Unfair Trade Practices Act. After the presentation of the Plaintiff's case, the Honorable Robert W. Hemphill, United States District Judge, granted Michelin's Rule 50 motion for a directed verdict as to these causes of action.

The Fourth Circuit Court of Appeals reversed the decision of the District Court and remanded the case for trial, finding that sufficient evidence had been presented from which a reasonable jury could find:

(1) a causal nexus between complaints and termination without speculating about the involvement of rival dealers. Appendix to Petition A-11;
(2) that the non-renewal of Bostick in May, 1978, was to bring a maverick into line and make the National Accounts program *as enforced* an effective barrier to dealer price competition. Appendix to Petition A-16;
(3) that Bostick was terminated in furtherance of an unfair or anticompetitive purpose in violation of the South Carolina Unfair Trade Practices Act § 39-5-10, et seq., Code of Laws of South Carolina, 1976.

Michelin does not, in its Petition for Certiorari, challenge the Court of Appeals decision regarding the South Carolina Unfair Trade Practices Act.

SUMMARY OF ARGUMENT

Reasons For Denying The Writ

There are three compelling reasons why this Court should deny the Writ of Certiorari.

First, Michelin has misinterpreted the holding of the United States Court of Appeals for the Fourth Circuit regarding proof of conspiracy under 15 U.S.C. § 1. The Court of Appeals did not conclude that "complaints followed by termination support an inference of a conspiracy." Michelin's Petition at A-5. On the contrary, the Court of Appeals noted that the evidence presented at trial in this case showed more than mere complaints followed by termination. Appendix to the Petition at A-9. Such finding gave rise to an inference of conspiracy sufficient to support a cause of action under Sherman § 1 under controlling case law, *D. B. Rice Tire Company v. Michelin Tire Company*, 638 F.2d 15 (4th Cir. 1980), *cert. denied*, 454 U.S. 864 (1981), and the Fourth Circuit did not have to reach the issue of whether to adopt the Seventh Circuit's position in *Spray-Rite Service Corp. v. Monsanto*, 684 F.2d 1226 (7th Cir. 1982). Accordingly, this Honorable Court is not presented with a case in which the Fourth Circuit Court of Appeals has rendered a decision in conflict with other federal courts of appeals.

Second, contrary to Michelin's contentions, the Court of Appeals did not conclude that Michelin's National Accounts program, standing alone, constituted a *per se* illegal restraint. In its decision the Fourth Circuit found that sufficient evidence had been presented to create a jury question as to whether Michelin had used the National Accounts program to enforce a barrier to dealer price competition. Appendix to Petition A-16. In its decision, the Fourth Circuit specifically considered

Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1, 9 (1979) and its decision is not in conflict with that decision. Appendix to Petition A-13.

Finally, since that portion of the Fourth Circuit's opinion regarding the South Carolina Unfair Trade Practices Act is not challenged in the Petition for Writ of Certiorari, that portion of the case, pursuant to the remand of the Fourth Circuit, must be tried at a later date. Remand for the trial of that portion of the action could eliminate the necessity of this Court's deciding any of the issues asserted in the Petition for Writ of Certiorari.

ARGUMENT

1.

Michelin misinterprets the decision of the Court of Appeals when it states that the Court of Appeals concluded that "proof of termination following competitor complaints is sufficient to support an inference of concerted action." Michelin Petition at 5.

Michelin argued in the Court of Appeals that the evidence showed only complaints and that complaints standing alone did not make a conspiracy, citing several of the cases set forth in Michelin's Petition at 5-7. The Court of Appeals acknowledged that mere complaints do not a conspiracy make and went on to state:

> "Were this a proper case we might well agree with this unstartling principle. *In this case, however, the evidence elicited at a trial showed more than just uninfluential competitor complaints 'standing alone'.*" *H. L. Moore Drug, supra*, 662 F.2d at 941. (emphasis added) Appendix to Petition A-9.

Thus, while the Court of Appeals cited and quoted from *Spray-Rite Service Corp. v. Monsanto*, 684 F.2d 1226 (7th Cir. 1982), it held that in the present case the evidence demonstrated more than termination following competitor complaints. This holding is entirely consistent with the Fourth Circuit's prior decision in *D. B. Rice Tire Company v. Michelin Tire Company*, 638 F.2d 15 (4th Cir. 1980), *cert. denied*, 454 U.S. 864 (1981), as well as with all other courts of appeals which have considered the question.

The Court of Appeals, in reviewing the evidence concerning the connection between complaints and termination, found evidence that Michelin's Sales Vice President, Mr. Duleyrie, had knowledge of the complaints. In reviewing Mr. Duleyrie's knowledge and subsequent actions, the Court noted:

> Mr. Duleyrie's knowledge of the complaints, and his direction of subordinates to take various actions in response, can also be inferred from admitted knowledge of the situation and directives to local Michelin officials by the regional corporate sales manager who reported directly to and took orders from Mr. Duleyrie. Michelin's own theory of termination — that it was merely responding to the disillusionment of other dealers stemming from Bostick's lack of service facilities — implicitly recognizes that termination was something more than a unilaterally motivated action. Appendix to Petition A-11.

The Court of Appeals also rejected Michelin's assertion that a ruling in favor of Bostick would create a presumption of combination or conspiracy whenever distributors' complaints are followed by a supplier's termination of a disfavored rival distributor:

> But we need not adopt such a presumption here to require submission of the case to the jury in the face of other evidence, beyond bald complaints, upon which a causal connection between the competitors' objections to price-cutting and the termination could be found. Also, these cases cited as rejecting Girardi, see, e.g., Roesch v. Star Cooler, supra. 671 F.2d at 1172; E. J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F.Supp. 243, 256 (E.D. Pa. 1979), aff'd, 637 F.2d 103 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981), in actuality only criticize the expansive view of that case, while preserving the narrower point that such other evidence as we find here will be enough to raise an issue of fact regarding § 1 concerted activity. Michelin's Petition at A-12. N. 12.

The Court of Appeals in its decision set forth a detailed discussion of the evidence produced at trial. Michelin's Appendix to Petition A-2 through A-8. Based upon the evidence presented the Court of Appeals then concluded:

> It is ultimately, then, a factual issue for the jury to determine whether Bostick was terminated to placate rival dealers objecting to price-cutting, or instead for lack of service facilities as Michelin claims. Appendix to Petition at A-12.

The Court of Appeals, in reversing the District Court, found that the evidence produced at trial was sufficient to meet the requirements of other circuits regarding the proof of a causal connection between complaints and termination. Accordingly, the opinion of the Court of Appeals, when viewed in light of the facts set forth in the opinion is entirely consistent with the criteria set forth in the decisions of the other circuits.

2.

The Court of Appeals did not conclude that Michelin's National Accounts program standing alone constituted a *per se* illegal restraint of trade. The Court of Appeals specifically acknowledged that:

> "... we are not unmindful that a per se label should not be mechanically applied, *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 9 (1979)"; Appendix to Petition at A-13.

The Court of Appeals held that the evidence presented at trial created a jury question as to whether Bostick's non-renewal in May, 1978, was a last resort by Michelin "to bring a maverick into line and make the National Accounts program *as enforced* an effective barrier to dealer price competition." Appendix to Petition at A-16 (emphasis added).

The Court of Appeals concluded that:

> "... proof of an illegal resale price maintenance arrangement does not rest upon a showing that the National Accounts program in its structure on paper restricts market pricing if in practical effect the 'coercive potential of summary termination' keeps discounting dealers in line. *Greene vs. General Foods Corp.*, 517 F.2d 635, 658 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976)." Appendix to Petition at A-16.

The Court of Appeals decision is not in conflict with *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., supra*, but in fact expressly considered that decision. The Court of Appeals found existing a factual question as to whether the National Accounts program was being enforced as a barrier to dealer price competi-

tion, not that the program itself was a *per se* restraint of trade. Accordingly, there is no conflict with *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., supra*, requiring review by this Court.

3.

In its decision, the Court of Appeals reinstated Bostick's claim under the South Carolina Unfair Trade Practices Act and concluded:

> "It is therefore entirely possible that the jury could find Bostick to have been terminated in furtherance of unfair or anticompetitive purposes . . ." Appendix to Petition at A-21, A-22.

Michelin challenged this ruling on Petition for Re-hearing but has not challenged this ruling in its Petition for Certiorari.

Since this issue has not been presented to this Court and thus remains to be submitted to a jury on retrial, this Court need not review this matter. In *Brotherhood of Locomotive Firemen and Enginemen, et al. v. Bangor and Aroostook Railroad Co.*, 389 U.S. 327 (1967), this Court in denying certiorari noted:

> ". . . because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

It is submitted that the Court of Appeals remand of this action for retrial on the state claims may alleviate the necessity of this Court passing on the questions presented, and the Writ of Certiorari should not be granted.

CONCLUSION

For the above stated reasons, the Respondent respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

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DATED: September 15, 1983

APPENDIX A

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 28, Bostick Oil Company, Inc. makes the following disclosure:

The corporation, Bostick Oil Company, Inc. has no parent companies, subsidiaries or affiliates.

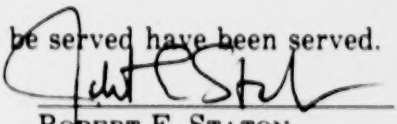
APPENDIX B

CERTIFICATE OF SERVICE

This is to certify that three copies of the Brief of Respondent in Opposition were served upon opposing counsel this 15th day of September, 1983, by depositing in the U.S. Mail, with proper postage affixed, addressed to:

J. Brantley Phillips, Jr.
217 East Coffee Street
Greenville, S. C. 29601

All parties required to be served have been served.



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